United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1042

To be argued by
FREDERICK T. DAVIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1042

B
P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

MARX JACKSON, a/k/a "MOXIE", ARLETHA FRANKLIN, and VIRGIL WHITE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Arletha Franklin, Virgil White, and Marx Jackson, a/k/a "Moxie," appeal from judgments of conviction entered on January 13, 1977, in the United States District Court for the Southern District of New York, after a three-week trial before the Honorable William C. Conner, United States District Judge, and a jury.

Indictment 76 Cr. 274 was filed on March 19, 1976, in seven counts. Count One charged all appellants, together with Joann Jones other defendants who did not go to trial,* unindicted co-conspirator Earl Rivers, and

* Of the defendants who did not go to trial, Raymond Anderson, a/k/a "Slim," Bernard Johnson, and Joe King were fugitives. Robert Moore, who was named only in the conspiracy

[Footnote continued on following page]

others, with conspiracy to distribute and to possess with intent to distribute Schedule I and II narcotic drug controlled substances. Counts Three through Seven charged separate, substantive violations of Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A.)* In particular, Count Three charged Arletha Franklin and others with having possessed with intent to distribute and with distributing approximately one-eighth kilogram of heroin in December 1973; Count Five charged Virgil White and others with having possessed with intent to distribute and with distributing approximately one-eighth kilogram of heroin in February 1974; Count Six charged Marx Jackson and another with having possessed with intent to distribute and with distributing approximately one-eighth kilogram of heroin in February 1974; and Count Seven charged Arletha Franklin and another with having possessed with intent to distribute and with distributing approximately two and one-half ounces of heroin in April 1974.**

Trial commenced on November 10, 1976, with the selection of a jury. On November 30, 1976, the jury returned verdicts of guilty on all defendants on all counts in which they were named.

On January 13, 1977, Judge Conner imposed the following sentences: Joann Jones—three years of probation;

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count, moved prior to trial for the dismissal of the charge against him on the ground that his conviction in Pennsylvania for related offenses precluded his further prosecution. The District Court granted this motion. (Tr. 235). Edith Rivers pleaded guilty to Count One on October 28, 1976, and on December 16, 1976, she was sentenced by Judge Conner to a term of probation.

* Count Two charged only the absent defendant Raymond Anderson with having engaged in a continuing criminal enterprise in violation of Title 21, United States Code, Section 848.

** Count Four charged only defendants not on trial.

Arletha Franklin—five years of probation; Virgil White—two years imprisonment, of which all but six months was suspended, to be followed by three years of special parole; Marx Jackson—five years imprisonment, to be followed by three years of special parole. Jones has not appealed her conviction.

Statement of Facts

The Government's Case

A. Synopsis

The Government's proof demonstrated a widespread and active network to distribute heroin, and occasionally cocaine, among several cities on the East Coast. While initial conspiratorial activity began as early as 1972, the principal transactions occurred between November 1973 and March 1974.

The source of all the heroin and cocaine distributed was Raymond Anderson, a/k/a "Slim," who owned and operated out of a restaurant on Eighth Avenue in New York City. Edith and Earl Rivers, his principal couriers, carried heroin and cocaine for Anderson from New York to Williamsport, Pennsylvania; Washington, D.C.; Atlanta, Georgia; and other cities. Joann Jones and Arletha Franklin lived in Williamsport, as did the Rivers couple during most of the conspiracy; they aided Rivers in the transportation and dilution of numerous packages of heroin, and Franklin also acted as the "stash" for all the heroin taken to Williamsport. Marx Jackson purchased three packages of heroin, as well as some cocaine, from Rivers, and Virgil White also purchased three packages of heroin from Rivers. In addition, both Jackson and White met and directly dealt with Anderson, as well as with other co-conspirators.

..e principal witnesses were Edith and Earl Rivers. Their testimony was corroborated by the testimony of co-consp' ator Robert Moore, Del Zora Graves, and one Sams..n Williams. Finally, certain corroborating exhibits and two confessions by Joann Jones were introduced into evidence.

B. The conspiracy is hatched—1972-1973

In 1972, Earl Rivers was in Lewisberg and Allenwood federal penitentiaries serving a prison sentence for counterfeiting. While in prison, he met Raymond Anderson, whom he knew as "Slim," and after they became friendly he helped Anderson—who was functionally illiterate—write and read letters. Toward the end of his and Anderson's incarceration, Anderson told him that when they were released he could supply Rivers with regular amounts of heroin. Anderson also gave Rivers two telephone numbers where he could be reached in New York City, which Rivers eventually entered into his telephone book * (Tr. 330-33).**

Shortly after his release from prison on September 21, 1972—a day or two after the release of Anderson—Rivers was in contact with two acquaintances from Balti-

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* Government's Exhibits 2, 3, and 4 were identified by Edith (Tr. 106-11) and Earl Rivers (Tr. 458-61) as address books in which they kept the names and telephone numbers of associates. Anderson's telephone numbers, as well as the names and telephone numbers of all the defendants on trial, and of other participants in the narcotics transacti described during the trial, appear in those exhibits.

** Citations to "Tr." refer to pages in the official transcript of the trial; citations to "GX" refer to Government's Exhibits admitted into evidence; citations to "DX" refer to defendants' exhibits.

more named Butch Butler and Walter Burman, who mentioned that they could sell heroin. After speaking with Anderson on the telephone, Rivers drove with Butler and Burman to Anderson's restaurant at 2222 Eighth Avenue in New York City and purchased from him approximately one kilogram of heroin. The purchase price for this amount was $7,500, of which Rivers immediately paid Anderson $5,000 of Burman and Butler's money. The heroin he received from Anderson was of poor quality; as a result, he did not repay the remaining $2,500 and, because of this outstanding debt, he did not purchase heroin from Anderson again in 1972. (Tr. 333-35; 625-35; 766-69).*

C. The Williamsport connection

During the fall of 1973, Rivers began to spend time in Williamsport, Pennsylvania, and in November 1973, he moved there. Prior to moving to Williamsport, he had already known Joann Jones on a social basis, and he came to know Arletha Franklin and Bobby Moore. After discovering that Moore distributed "speed" and other kinds of drugs in Williamsport, Rivers began to use Moore to distribute heroin. On several occasions he used Joann Jones to "stash" the heroin that he brought to Williamsport for Moore (Tr. 37-39) and to deliver packages of heroin to Moore. (Tr. 349).

In November 1973, Rivers, to his surprise, received a telephone call from Anderson. Anderson invited Rivers to come to New York to purchase heroin, and noted

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* While this transaction in October 1972 was listed in this indictment as Overt Act Two of the conspiracy count, it was more particularly the subject of a separate indictment, 76 Cr. 275, charging Anderson, Butler and Burman with the transaction. Both Butler and Burman were convicted before Judge Charles M. Metzner on that indictment; Anderson, of course, is fugitive.

that "we would work something out" about the outstanding debt of $2,500. (Tr. 339, 340). The next day, Rivers drove with Joann Jones from Williamsport to New York City where, at Anderson's Eighth Avenue restaurant, he purchased a package of heroin. He and Jones then carried the narcotics to Williamsport, where Rivers and Arletha Franklin then "cut" the heroin, and Franklin took the heroin to her house for storage.* Moore subsequently retrieved the narcotics from Franklin's house, sold it, and delivered the profits to Rivers, who subsequently paid Anderson. (Tr. 339-50).

This proved to be the pattern for numerous ** subsequent trips by Rivers and others to New York City to purchase heroin from Anderson. These trips were made variously by Rivers and his wife (Tr. 33-49; 350-51; 353); the Rivers couple together with Joann Jones (Tr. 57-58; 355) or Arletha Franklin (Tr. 356), and by Edith Rivers alone. (Tr. 53-57; 357-58).*** On one occasion, Edith Rivers traveled to New York with Arletha Franklin and her sister Delzora Graves (Tr. 68-72; 355-61; 844-78),**** and on another Earl Rivers drove to New York in his new pickup truck with Bobby Moore. (Tr. 356-57; 894-97). On each occasion, the couriers

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* This was pursuant to an agreement between Franklin and Rivers that Franklin would "stash" heroin purchased by Rivers in return for payment of $300 or $350 per week. (Tr. 345-46).

** Indeed, there were so many trips that Rivers and his wife each acknowledged that they could not keep accurate track of the exact number. (Tr. 353). Edith Rivers estimated that the number was somewhere between 10 (Tr. 49) and 25 (Tr. 141).

*** The purpose of Edith Rivers making the trip alone was that Anderson complained that the presence of out-of-state licensed cars might attract police. (Tr. 357).

**** Both Edith Rivers (Tr. 316) and Delzora Graves (Tr. 876) testified that Delzora, who was not prosecuted, did not know that the purpose of the trip was to procure heroin until after the trio returned to Williamsport.

received the package of heroin * from Anderson, usually in his restaurant but occasionally at selected other meeting spots in New York City, and would carry the packages back to Williamsport. In Williamsport, Rivers would "cut" the heroin with the aid of his wife and occasionally Joann Jones and Arletha Franklin (Tr. 65, 72) and "bag" the packages in small packets. (Tr. 43-44). These packages were then picked up by or delivered to Arletha Franklin, who would "stash" them pursuant to her agreement with Rivers; Moore would subsequently receive the packages from her for retail distribution. (Tr. 50, 353-55). These trips—which would be made whenever the chace of heroin was getting low—continued without significant break until March 1974.

D. The Atlanta, Georgia sales

After the flow of heroin between New York City and Williamsport was established, Rivers expanded the scale of the conspiracy's operations. In early January 1974, he, Edith Rivers, a friend named John Green and John Green's girl friend Pat drove to Atlanta, Georgia, carrying a package of heroin. When they arrived, they checked into a Holiday Inn on the outskirts of Atlanta, and shortly thereafter Rivers telephoned Virgil White to announce their arrival.** White subsequently arrived at the Inn together with co-conspirator Bernard Johnson, driving a Grand Prix Pontiac. (Tr. 81-82; 371-74). After talking in the Inn, Rivers and his wife went to Virgil

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* Rivers testified that Anderson would frequently include in the package small amounts of cocaine for his own use and that of his friends. (Tr. 344, 351-52). Anderson also sold Rivers cutting material for the heroin. (Tr. 42).

** Prior to driving to Atlanta, Rivers had spoken with White on the telephone to arrange the transaction. (Tr. 501-04). He had also "checked out" White by talking with several other people about him. (Tr. 496, 786-87).

White's house and helped White and his wife, together with Johnson and his wife, "cut" a portion of the heroin. The cut portion he then left with White and Johnson to distribute. (Tr. 82; 371-76).

A day or so later, the Rivers couple and John Green and Pat moved out of the Holiday Inn into the Atlanta Regency Hyatt, where they registered using a false credit card in Green's possession in the name of Jason Lyman.* They then stayed in Atlanta several more days, and helped the Whites and the Johnsons "cut" heroin on at least one further occasion. Prior to leaving, Rivers received several thousand dollars in initial payment for the heroin from White. He also went out with Green to purchase some glassine bags for the heroin.** (Tr. 83-86; 376-84).

Also while Rivers was in Atlanta on this trip, he spoke by telephone with Arletha Franklin, who informed him that the heroin supply in Williamsport was running low. Rivers then sent Green by train to Baltimore, where

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* Important corroboration of the Rivers' testimony was the Government's proof that in November 1973 John Green applied for and received a Master Charge card from the Bank of Virginia in the name of Jason Lyman (Tr. 813-14; GX 9, 10), and that numerous credit card receipts were received by the bank during January and February 1974. These receipts, which were admitted into evidence (GX 11a through 11s), detailed the movements of Green during much of the time he was with Rivers. GX 11c showed that "Jason Lyman" registered in the Regency Hyatt hotel in Atlanta on January 8, 1974.

** One of the "Jason Lyman" credit card receipts showed a purchase of glassine bags in Atlanta, Georgia, on January 15, 1973 (GX 11r) as well as several other purchases on January 15, 1974. (GX 11i through 11o). On summation, the Government pointed out that the 1973 date on GX 11r must have been a typographical error for 1974—a common mistake at the beginning of the new year—since the card was not even issued until November 1973. (GX 10; Tr. 1622).

he drove to Williamsport and delivered to Franklin an amount of heroin from the package Rivers had with him in Georgia. (Tr. 379-80).*

Rivers and his wife subsequently made a second trip to Atlanta, Georgia, carrying a further package of heroin from Anderson. On this occasion, they stayed at another hotel, of which they were unsure of the name, and also with White and Johnson. As before, White and Johnson and their wives helped Rivers cut the heroin, and the heroin was left with White for distribution. (Tr. 87-89; 399-401).

Sometime after the trips to Atlanta, White and Johnson drove to Williamsport, after spending the night in Baltimore, Maryland * and picking up John Green. (Tr. 403-05; 1363). Later that same day, Rivers, driving with White and Johnson in their Pontiac, traveled to New York City where the three of them met Anderson at his restaurant on Eighth Avenue. Rivers purchased a package of heroin for his own distribution in Williamsport, and also packages of heroin and cocaine to deliver to Marx Jackson in Washington, D.C.; White and Johnson also purchased a package of heroin directly from Ander-

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* Green's movements were corroborated by "Jason Lyman" credit card receipts showing the purchase of railway tickets in Georgia, the purchase of food on board the train, incidental purchases in Baltimore, and the purchase of gasoline in Pennsylvania on dates exactly corresponding to Rivers' testimony. (GX 11b, 11e, 11f and 11g). Rivers' testimony that Green made another air trip to and from Atlanta during his stay there (Tr. 381) and that Pat was sent off to Florida when she sniffed too much heroin (Tr. 381) was similarly corroborated by Master Charge receipts indicating the purchase of such tickets. (GX 11a and 11d).

* They also stopped in Washington, D.C., to meet Marx Jackson at Rivers' request; this meeting is described in more detail at p. 12, *infra*.

son. Rivers, White and Johnson then drove to Washington, D.C., where Rivers left White and Johnson to continue to Atlanta with their heroin, and met Jackson to complete the sale to him. (Tr. 408-410).*

Sometime later, White and Johnson made a second trip to Williamsport, this time arriving by airplane and staying at the Holiday Inn.** Rivers introduced them to Bobby Moore, who in turn procured two girls for them to take back to the motel (Tr. 415-18; 897-903), and White and Johnson attended a party at Rivers' apartment with a number of other people. Because of the amount of money White and Johnson still owed from the previous purchases, however, Rivers did not want to deal with them any further, and made excuses why they could not travel to New York to meet Anderson. White and Johnson subsequently left without purchasing narcotics. (Tr. 418-19).

E. The Washington, D.C., sales

In September 1973, Rivers had a conversation in Washington, D.C., with one Joe King, whom he had known previously. King stated that he would like to have a source for heroin, and Rivers gave him Anderson's name and telephone number. (Tr. 361-62). Several weeks later, Rivers and his wife received a telephone call in Williamsport from Anderson, stating that King and his girl friend "Dimples" were with him in New York City and wanted to purchase heroin. Rivers guaranteed repayment by King if Anderson made the sale, and subsequently was told by Anderson that Anderson gave King

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* The genesis and result of the sale to Jackson is described in more detail p. 12, *infra*.

** GX 17 was a Williamsport Holiday Inn registration receipt showing that Virgil White registered there on February 21, 1974.

a package of heroin. (Tr. 91-92; 363-64). Later in 1973, Anderson complained that King had not paid for the package. (Tr. 92; 365).

Very shortly after returning from his first trip to Atlanta, described pp. 7-9, *supra*, Rivers received a telephone call from Anderson stating that Anderson wanted to go with Rivers to Washington to "get" King because of the nonpayment of the money due for the package. Rivers thus flew to New York and later that same evening drove with Anderson, a bodyguard, and Anderson's girlfriend to Washington, D.C. to look for King. (Tr. 385-87). When they pulled in front of Harrington's restaurant in Washington, Rivers remarked to Anderson that his "old friend" "Moxie" was in the restaurant.* Anderson stated that he wished to speak with Jackson, and he and Rivers entered the restaurant. Anderson and Jackson spoke at the restaurant, at which time Rivers also talked with Samson Williams and others who were there,** and later that night Rivers, Jackson, Anderson and others went to the Aspen Motor Inn to continue the conversation. At the end of the meeting, Rivers agreed with Jackson and Anderson to bring a package of heroin to Jackson in Washington the following day. Rivers and the Anderson party checked into the Aspen

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* While the details of Anderson and Jackson's prior relationship was not brought out in the Government's direct case, when Jackson testified it was revealed that he and Anderson had known each other—and, to a certain extent, Rivers—in federal prison, when Anderson was serving a prior narcotics sentence and Jackson was serving a 5-10 year sentence for bank robbery. (Tr. 1441-48).

** Corroboration of the meeting between Anderson and Rivers was provided by the testimony of Samson Williams. This testimony and the circumstances of its introduction into evidence at the trial are discussed in more detail in the Argument section of this brief, pp. 29-43, *infra*.

Inn for the night * and returned to New York the next day. (Tr. 387-96).**

Upon his return to New York with Anderson, Rivers picked up a package of heroin for himself and some heroin and cocaine for Jackson and took the bus back to Washington. In that city, he looked for Jackson downtown and eventually found him when he ran into a girl who was also looking for him, and who drove him to a house where Rivers met Jackson and delivered the package. He subsequently returned to Williamsport by bus. (Tr. 396-97).

This was the first of three packages of narcotics that Rivers delivered to Jackson. The second delivery occurred at the time of the first trip to Williamsport by White and Johnson, see pp. 9-10, *supra*. Shortly prior to the arrival of the men from Georgia, Rivers was owed money by Jackson for the first package, and thus he asked the Georgians to stop in Washington to retrieve the money from Jackson so that he could deliver it to Anderson. (Tr. 403-04). When the Georgians arrived in Williamsport, they confirmed to Rivers that they had met with Jackson, but that due to a misunderstanding he declined to entrust them with the money. (Tr. 405-06). After picking up heroin from Anderson with White and Johnson, see p. 10, *supra*, Rivers drove with them to Washington and delivered the second package of narcotics, consisting of an eighth of a kilogram of heroin and a like amount of cocaine, to Jackson. (Tr. 410-11). The third transaction occurred some time thereafter, when

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* GX 6 and 7 were Aspen Inn registration receipts showing these check-ins on January 16, 1974.

** Prior to leaving Washington, D.C., Rivers and Anderson confronted King. (Tr. 396). King later told Rivers and his wife (Tr. 92-92A) that he had not paid for the package because the heroin was of poor quality.

Rivers and his wife made a night trip to New York City to receive narcotics from Anderson, and delivered it to Jackson early the next morning in Washington. Jackson did not pay Rivers the full price of the package, but stated that he would deal directly with Anderson thereafter and would travel to New York City to pay Anderson himself. (Tr. 73-75; 411-15).

F. The conspiracy ends

In March 1974, Rivers and his wife made their last joint trip to Anderson in New York City. Together with Ross Hewitt * they drove first to Rivers' family's house in New Jersey, and made an unsuccessful trip to New York City to find Anderson. While they were in New Jersey, Rivers made a telephone call to Aretha Franklin in Williamsport asking her to send him money by telegraph in order to pay Anderson; he subsequently received two money orders—one sent by Franklin herself and one by her next door neighbor Daniel Coney—totalling $2,500.** With this money, Rivers, his wife and Hewitt made a second trip to New York and purchased a package of heroin from Anderson. A portion of this heroin they hid in Rivers' brother's house in New Jersey (Tr. 95-96; 428), and later that day they met a person named Lynn on the highway to Washington, D.C., and sold him some more heroin. (Tr. 96; 429). Rivers and his wife then continued to Washington, D.C., where they sold all

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* Hewitt was identified as a co-conspirator in papers filed prior to trial.

** Mr. Robert Mills, a Western Union employee, identified GX 12, 12a, 13 and 13a as microfilm copies of money orders transmitted by his company. (Tr. 560-66). They revealed the transmittal of $1,500 by Daniel Coney on March 18, 1974, and of $1,000 by Franklin on March 16, 1974 from Williamsport Pennsylvania. Rivers identified his signature on the back of the two receipts, GX 12 and 13. (Tr. 425).

but a small amount of the heroin to one Roy Hinnant, and returned to Williamsport. At this point Edith Rivers was carrying the remaining bit of heroin on her person. (Tr. 96-99; 429-31).

Shortly after their arrival in Williamsport, Rivers was arrested and remained in jail for one month until he was released on bail. (Tr. 99; 431-33). During that period, Edith Rivers distributed the remaining amount of heroin to Arletha Franklin. She also drove with one Billy Allen, a boyfriend of Joann Jones, back to the house of Rivers' brother and retrieved the heroin hidden there. Franklin subsequently came to her house and retrieved this heroin, hiding it in the diapers of a baby she was carrying. (Tr. 100-02).

During the period immediately after Rivers' arrest, two more trips were made to Anderson in New York City. Franklin arranged through Edith Rivers to make one trip; she subsequently complained to Earl Rivers (whom she visited in prison) that the heroin was of poor quality. (Tr. 103-04; 434-36). Edith Rivers also made one trip alone to see Anderson in order to procure aid for her husband, but Anderson refused to help her. (Tr. 104-05).

G. Joann Jones confesses

In November 1975, Special Agents James Peacher and Albert Reilly of the Drug Enforcement Administration served a subpoena upon Joann Jones in Williamsport, Pennsylvania. She subsequently came to their office in Newark, New Jersey, and, after being duly warned of and acknowledging her rights, signed a written statement. In that statement, she admitted carrying narcotics for Earl Rivers on several occasions between Raymond Anderson in New York and Williamsport; she further

admitted that she knew the packages contained heroin since she tasted the contents. (Tr. 1078-86; GX 20). On February 20, 1976, Jones voluntarily came to the office of the United States Attorney where, in the presence of Agent Reilly, she was again warned of her constitutional rights. After selecting a photograph of Anderson from a spread of photographs, she agreed to cooperate with the Government as a witness and to appear in the grand jury. (Tr. 1086-88). That same day, she appeared before the grand jury and, after being warned of her constitutional rights, she repeated, under oath, substantially the same admissions she had previously made, adding that she also cut the narcotics for Rivers in Williamsport. (Tr. 1125-27; GX 21).

The Defense Case

Each of the four defendants testified in his or her own behalf; in addition, two of them—White and Jackson—called other witnesses.

A. Joann Jones

Jones testified that while she went on several trips to New York City with Earl Rivers—who she claimed was only a social friend—she did not know what the packages contained, nor did she ever hold any narcotics for him or help him to "cut" it. Her explanation for the admissions she had made to the narcotics agents and under oath in the grand jury was that in November 1975 she received a telephone call from Rivers. Rivers told her that he was in trouble with a murder investigation and asked her to aid him by telling the narcotics agents—falsely, she now claimed—that she actually carried packages of narcotics for him. (Tr. 1198-1248). On cross examination, she admitted that she tasted the contents of the first package she carried with Rivers and identified

it as heroin, but claimed that she nonetheless had no idea what was in the package the second time she helped Rivers carry one. (Tr. 1259).

B. Arletha Franklin

Franklin testified that she was a social friend of Earl Rivers, whom she liked and admired. She denied ever having stashed or distributed narcotics, and asserted that while she sent money to Rivers by telegram on several occasions, she did so in the belief that he was a legitimate businessman who had merely left money with her for his convenience. (Tr. 1275-1309).

C. Virgil White

Consuela White, the wife of Virgil White, testified that in January 1974, Edith and Earl Rivers stayed in their house for a weekend. This was done solely as a social gesture, since Rivers was a cousin of one Stanley Samuels, for whom White had worked. While the Whites and the Rivers, together with Bernard Johnson and his wife and John Green and Pat, went out socially, Mrs. White denied that anyone had possessed or "cut" heroin in her house or in her presence. (Tr. 1317-32).

Stanley Samuels, a cousin of Earl Rivers, stated that in early 1974 he received a telephone call from Rivers saying that he was coming to Atlanta, Georgia, on a social visit. Samuels replied that he might not be in town, but that he would arrange for a place for the Rivers couple to stay at the house of Virgil White. During the following weekend, Samuels spoke briefly with Rivers on social matters, but neither saw nor heard anything related to heroin. In particular, Rivers mentioned that he wished to sell his pickup truck because he was behind on the loan payments, and Virgil White ex-

pressed interest in buying it. Subsequently, Samuels himself purchased the truck. (Tr. 1333-42).

Virgil White testified that he met the Rivers couple, together with John Green and Pat, on a social basis during an early weekend in 1974. He denied ever discussing or possessing any narcotics, and claimed that the weekend was entirely social. During that weekend, Rivers told White that he was falling behind on the payments on a pickup truck and would sell the truck to White if White took over the payments. Several weeks later, White and Bernard Johnson drove to Williamsport and checked into the Holiday Inn to inspect the pickup truck. After meeting socially with Edith and Earl Rivers, he, Rivers and Johnson drove into New York City (for no articulate reason) and ate a meal at a restaurant. In New York, Rivers stated for the first time that he would not sell the truck; thereafter, Johnson and White drove Rivers to Washington, D.C., and then continued on to Atlanta. (Tr. 1347-69). White added that he saw Rivers on one more occasion in 1975. (Tr. 1369-70).*

D. Marx Jackson

Viola McMichaels testified that she had been a girl friend of Jackson. In 1973, she was arrested on a forgery charge in Washington, D.C., and was released on bail for several weeks pending her sentence. (DX C). On one occasion during that period, she ran into Earl Rivers, whom she had met previously, and gave him a ride to Jackson's mother's house, where she saw Jackson and Rivers meet. She was sure this occurred in 1973 since in August 1973 she began serving her sentence; in

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* This testimony—which was explicitly reconfirmed on cross-examination (Tr. 1380)—was patently false, since Rivers was in continuous custody since October 1974. (Tr. 654).

January 1974 she was in federal prison except for a period of seven days commencing January 20. (Tr. 1395-1424).* On cross-examination, she admitted that she lied to prison authorities about several matters simply because she thought it might help her. (Tr. 1426-27).

Marx Jackson stated that he had known Raymond Anderson while he (Jackson) was in federal prison serving a sentence for bank robbery, and that he frequently wrote or read letters for Anderson. After his release in 1973, he came to know Rivers slightly on a social basis. On one occasion in 1973, Rivers came to the door of his mother's house and spoke with him, although Jackson could not remember the content of the conversation. Jackson denied ever dealing in narcotics with Rivers, and denied meeting Rivers in any but a social context. (Tr. 1431-94). On cross-examination, he acknowledged that he was a personal friend of Samson Williams (Tr. 1496), and that he had committed and been convicted of a further federal crime after being released on bail in this case. (*Id.*).

ARGUMENT

POINT I

The Evidence Demonstrating a Single Conspiracy Was More than Sufficient.

All three appellants claim that the evidence at trial showed multiple conspiracies rather than a single one. This claim, which the Court has recently observed is

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* Ms. McMichaels thus claimed to be the girl whom Rivers had seen while searching for Jackson to deliver the second package of heroin to him, see p. 12, *supra*. The apparent purpose of her testimony was the attempted demonstration that the meeting took place in August 1973, and not January 1974, as Rivers had claimed.

"now routine" in narcotics conspiracy cases, *United States* v. *Head*, 546 F.2d 6, 7 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1129 (Feb. 22, 1977), see also *United States* v. *Panebianco*, 543 F.2d 447, 452 (2d Cir. 1976); *United States* v. *Magnano*, 543 F.2d 435, 433 (2d Cir. 1976), *cert. denied*, — U.S. —, 45 U.S.L.W. 3570 (Feb. 22, 1977), is totally without merit.

First, it should be noted that the issue for appellate review is extremely narrow. This Court has held on numerous occasions that the multiple-single conspiracy question is one for the jury to decide. *United States* v. *Ricco*, 549 F.2d 264, 268 (2d Cir. 1977); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 789 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3601 (March 7, 1977); *United States* v. *Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976), and cases there cited. As such, the sole issue on appeal is whether the evidence, viewed in the light most favorable to the Government, *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), was sufficient to submit the conspiracy count to the jury. *United States* v. *Ricco*, *supra*; *United States* v. *Armedo-Sarmiento*, *supra*.* In addition, if the proof demonstrates several smaller conspiracies, the jury may nonetheless be justified in finding one overall conspiracy. *United States* v. *Tramunti*, 513 F.2d 1087, 1107-08 and n.26 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Ricco*, *supra*, 549 F.2d at 269.

A review of the record reveals that the evidence demonstrating a single conspiracy was overwhelming.

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* This fact itself demonstrates the factitious nature of the appellate claim: while the single-multiple conspiracy issue is the principal—and virtually the sole—question raised by Franklin and White, they made it exceedingly difficult for the jury even to evaluate their claim by choosing not to mention the issue to the jury at all in their summations.

Indeed, the facts of this case fell well within the description of a "vertically integrated, loose-knit combination," *United States* v. *Leong*, 536 F.2d 993, 995 (2d Cir. 1976); *United States* v. *Bynum*, 485 F.2d 490, 495 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974), characteristic of New York narcotics conspiracies. As indicated in the Statement of Facts, the proof at trial showed the continuous activity of a closely circumscribed group of persons distributing a single narcotic drug (heroin)* from a single source during the limited period of time from November 1973 through March 1974.** Furthermore, the conspiracy functioned at all times with a core group that included the source for all the heroin—Raymond Anderson in New York—and two principal couriers, the Rivers couple, who accounted for the delivery of all of the heroin described in the Government's case. Indeed, the manner

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* While there was description of the transfer of certain relatively small amounts of cocaine, it was clear that these cocaine transfers were for the personal use of Rivers and his friends. (Tr. 351-52, 370, 397, 480, 742-43). Indeed, both Rivers and Edith Rivers (Tr. 80, 271) described in some detail their own consumption of cocaine, but never described selling it themselves.

The only distribution of cocaine for other than personal use described in the Government's case was a single sale of cocaine between Anderson and Marx Jackson. (Tr. 410-11). It was clear, however, that even this transfer of cocaine was incidental to the larger and more numerous sales of heroin, and indeed Jackson bought heroin at the same time he purchased the cocaine.

** While the indictment charged that the conspiracy began in 1972, and testimony of an initial purchase of heroin from Anderson in 1972 (not involving any of the defendants in this trial) was adduced from Rivers in his direct testimony, this clearly served only to show the origins and background of the conspiracy. Indeed, this testimony—which consumed a total of two pages out of a 2000 page transcript—was minuscule in comparison with the testimony of the dealings involving the appellants. This involved, without exception, events occurring between November 1973 and late Spring 1974.

in which the heroin was distributed—that is, by couriers traveling by bus or automobile between the source in New York and the recipient in each of the other cities—was at all times the same. In short, this case demonstrated virtually every indicium of a single conspiracy appearing in the numerous opinions of this Court on the subject.

Indeed, this case is governed *a fortiori* by numerous decisions in which the demonstration of a single conspiracy, while sufficient, was far weaker or more indirect than here. For example, this Court has upheld conspiracy convictions even when there was a demonstration of two or more sources for the narcotics, *United States* v. *Armedo-Sarmiento*, *supra*, 545 F.2d at 790 and n.3, or where different groups of couriers or suppliers were used at different times, *United States* v. *Leong*, *supra*, 536 F.2d at 995. This is not a case like *United States* v. *Tramunti*, *supra*, where the conspiracy continued in fits and starts over a period of years, or like *United States* v. *Panebianco*, *supra*, where the conspiracy was interrupted for months at a time when a major participant withdrew from the agreement, or like *United States* v. *Leong*, *supra*, where the recipients of the heroin did not even know the identity of the source or the suppliers, 536 F.2d at 994-95, although in each of these cases this Court found the evidence sufficient to sustain a finding of a single conspiracy. In this case the proof demonstrated a clear "consistency of personal, method and type of operation," *United States* v. *Hinton*, 543 F.2d 1003, 1014 (2d Cir. 1976), that is the explicit hallmark of a single conspiracy.

Finally, the record is clear that each of the appellants fully participated in this conspiracy. Without exception, each of them purchased narcotics not only from Rivers and his wife on numerous occasions, but also dealt directly with Raymond Anderson at his headquarters in New York

City. In addition, their contact with Rivers was in each instance repeated and continued over a period of time. Virgil White purchased two separate packages of Anderson's heroin from Rivers in Atlanta, travelled to New York with Rivers and purchased a third package directly from Anderson, made a second trip to Williamsport, Pennsylvania, to meet Rivers in an unsuccessful attempt to meet Anderson to purchase yet another package, and, finally, met Rivers one more time in Atlanta when Rivers was attempting to find some "cutting agents" for further narcotics. (Tr. 606). Marx Jackson similarly purchased three separate packages of narcotics from Anderson through Rivers. In addition, the evidence is clear that the initial purchases using Rivers as an intermediary were merely first installments in what was envisaged as a continuing relationship between Jackson and Anderson; indeed, there was explicit testimony that Jackson intended to meet Anderson, whom he had known independently of Rivers, to continue his transactions with him.* Arletha Franklin, of course, not only made several trips to New York City to meet Anderson in the company of Earl Rivers (Tr. 356), Edith Rivers (Tr. 68-72), and alone,** but also traveled to Florida to distribute heroin. (Tr. 359-60). Most importantly, she was

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* Rivers made it clear on both direct (412-13) and cross-examination (Tr. 704-14, 743-45) that he carried the three packages of narcotics to Jackson as an accommodation, even though he did not relish the role of courier. In addition, Edith Rivers testified that on one occasion when she and Rivers made a delivery of narcotics to Jackson, Jackson stated that pursuant to a prior agreement with Anderson he would pay Anderson for the heroin directly when they met in New York the following weekend. (Tr. 74).

** The proof underlying Count Seven, of which Franklin was convicted, demonstrated that shortly after Rivers was arrested, and at his suggestion, she contacted Raymond Anderson through Edith Rivers, traveled to New York, and purchased heroin directly from him. (Tr. 102-04; 434-36).

the "stash" for every one of the almost countless packages of heroin brought from Anderson in New York to Williamsport, Pennsylvania, for distribution and sale. Compared with the considerably less extensive evidence found sufficient to demonstrate the participation in a much broader conspiracy of the defendant Turner in *United States* v. *Taylor*, Dkt. No. 76-1210, slip op. 2805, 2813-14 (2d Cir. April 14, 1977) or the defendant Salley in *United States* v. *Tramunti*, *supra*, 513 F.2d at 1112, the participation of each appellant in this conspiracy was overwhelmingly clear.

The appellants' contentions to the contrary are based entirely on distortion of the facts in the record and a misunderstanding of the applicable law. For example, both Franklin, Brief at 26, and White, Brief at 19, assert that the Government's proof demonstrated more than one source for the heroin distributed by Rivers. This is simply false. While White notes that "'Slim' Anderson was not even the *principal* source of drugs, Butler and Burman, Mermie Jenkins, 'Peewee' Hammond, Philip Garretson and Bo Williams also supplied drugs to Rivers," Brief at 19 (emphasis in original), he neglects to inform the Court that the identities and activities of these individuals—who were not named as co-conspirators in the bill of particulars—were brought out on *cross*-examination of Earl Rivers in an effort to impeach him. (Tr. 628-40). The Government did not introduce any evidence of their narcotics dealings,* and certainly did

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* The only exception to this was the very brief mention in the direct examination of Earl Rivers of the fact that he purchased a quarter kilogram of heroin from Anderson in 1972 shortly after leaving prison together with Walter Burman and William Butler. (Tr. 234-35). This proof, of course, was necessary to show the background of the conspiracy, particularly since Anderson made explicit reference to it when he telephoned Rivers in Williamsport in November 1973, at the beginning of the active

[Footnote continued on following page]

not prove or contend that they were part of the conspiracy among Anderson, Rivers and the defendants at trial. Rather, the Government introduced evidence relating only to heroin emanating from Anderson and distributed by or through the defendants and the co-conspirators.

Furthermore, the appellants' legal assertions are totally incorrect. Both White, Brief at 18-21, and Franklin, Brief at 21-22, assert in similar language that since they did not know or directly deal with the other defendants on trial they could not be members of the same conspiracy. This contention was explicitly rejected in *United States* v. *Gentile*, 530 F.2d 461, 465 (2d Cir.), *cert. denied*, 426 U.S. 936 1976):

> Brasnier's ignorance of the identity or scope of the activities of other conspirators would not exonerate him from inclusion in the conspiracy charged in the indictment.

See also *United States* v. *Rubinson*, 543 F.2d 951, 960 (2d Cir. 1976). Rather, it is sufficient if the Government demonstrates that each defendant was aware of the gen-

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period of the conspiracy. This mention of the 1972 purchase consumed two pages of transcript, and no names were mentioned. In addition, the prosecutor carefully asked "And did that first purchase with Anderson involve anybody involved in this indictment?" to which Rivers answered "No." (Tr. 23). By contrast, lengthy cross-examination of Rivers (Tr. 624-49; 764-69) and of his wife (Tr. 216-21) was expended on exploring every detail of the 1972 transaction, as well as numerous other narcotics adventures of Rivers. It was only during this cross-examination that the names recited in White's Brief were elicited. Whatever the questionable value of this tactical choice of cross-examination, the appellants surely cannot rely on the evidence *they* adduced to support their conclusion that the *Government's* proof demonstrated multiple conspiracies.

eral horizontal scope of the conspiracy.* *United States* v. *Panebianco*, *supra*, 543 F.2d at 453 ("It is well settled that individual customers and suppliers are members of one overall conspiracy if they are aware of the size of the middleman's operations."); *United States* v. *Taylor*, *supra*, slip op. at 2811; *United States* v. *Steinberg*, 525 F.2d 1126, 1133 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States* v. *Miley*, 513 F.2d 1191, 1207 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975); *United States* v. *Borelli*, 336 F.2d 376, 383 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965). This the Government accomplished in two ways. First, as this Court has held on numerous occasions, the amounts, regularity and quality of the heroin shipments allowed—indeed, demanded—the inference that each member of the conspiracy knew that he was participating in a larger framework. *United States* v. *Ricco*, *supra*, 549 F.2d at 270; *United States* v. *Leong*, *supra*, 536 F.2d at 995-96; *United States* v. *Magnano*, *supra*, 543 F.2d at 434; *United States* v. *Mallah*, 503 F.2d 971, 983-94 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). In addition, the proof at trial specifically demonstrated this awareness. To give just a few examples, when Rivers was in Atlanta making his first sale of heroin to White and Johnson in January 1974, he received a telephone call from Arletha Franklin stating that the Williamsport "stash" of heroin was about to run out and requesting resupply. John Green then carried some of the heroin Rivers had with him in Atlanta and personally delivered it to Franklin in Williamsport. (Tr. 379-80). From this, Franklin could only have concluded that Rivers was transacting heroin business in Atlanta. In addition, Franklin

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* Each of the appellants of course, aware of the *vertical* scope of the conspiracy since, without exception, they each dealt directly with both the source of the heroin—Anderson—and the intermediary couriers.

carried heroin purchased from Anderson to Florida for Rivers (Tr. 359-60) and loaned her car to Rivers to travel to Atlanta. (Tr. 369). Similarly, Virgil White and Marx Jackson were shown to have had explicit knowledge of each other's relationship with River and Anderson. When White came north on his first trip to Williamsport, Rivers testified, "So I told him, I said 'Look, man, I am going to give you a number to a guy in Washington. I would like for you to stop and call this guy, you know, because he might have some money to send to New York for Slim. So I gave the number to Virgil. . . . The number—I gave him two numbers that Moxie [Jackson] had gave me." (Tr. 403). Jackson subsequently met White and Johnson on their trip to Williamsport, and while he declined to entrust the money he owed to Anderson to them, their altercation—described in some detail at the trial (Tr. 404-06)—clearly showed that all parties understood they were dealing with a common source of heroin.

Finally, the appellants' reliance on such cases as *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975); *United States* v. *Miley*, *supra*; and *United States* v. *Sperling*, 505 F.2d 1323 (1974), *cert. denied*, 420 U.S. 962 (1975), is totally misplaced. In *Sperling* and in *Miley*, in which the convictions were affirmed, dictum concerning the multiplicity of the conspiracies demonstrated in the government's case was directed to the fact that in each case entirely separate systems of narcotics distribution were shown, with only the loosest connection "at the top." In this case, by contrast, there was a single, continuing source and distribution system for the narcotics, and each of the conspirators dealt directly with both the source and distributors. Similarly, in *Bertolotti*, the proof demonstrated four unrelated criminal ventures, only one of which "resembled the orthodox business operation we have found to exist in narcotics conspiracies." 529 F.2d at 155. Rather, this Court found that the prosecutor

had "merely merged several conspiracies for the sake of convenience." *Id.** *Bertolotti*, which has been limited to its unusual facts in subsequent decisions, see, *e.g.*, *United States* v. *Magnano*, *supra*, 543 F.2d at 434; *United States* v. *Leong*, *supra*, 536 F.2d at 995, has no bearing on this case.

In short, the claim that the proof at trial failed to demonstrate a single conspiracy is meritless.

POINT II

The Appellants Cannot Complain of the District Court's Instructions to the Jury on Conspiracy.

As White notes in his Brief at 25, none of the appellants objected to the instruction given to the jury on the single-multiple conspiracy issue, nor did they request a different instruction. Rule 30 of the Federal Rules of Criminal Procedure specifies that in the absence of such action "no party may assign as error any portion of the

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* In clear contradistinction to the facts of *Bertolotti*, the acts of the prosecutor in this case showed that the Government understood and scrupulously observed the requirement of indicting and trying together only those defendants who actually joined a single conspiracy. For example, the acts of Walter Burman and William Butler in purchasing a package of heroin from Raymond Anderson using Earl Rivers as an intermediary and in traveling to Anderson's restaurant in New York to do so would, under the principles discussed in this brief, have sufficed to warrant their inclusion in this conspiracy. Nonetheless, because of the brief hiatus between their activity and that of the other defendants, but see *United States* v. *Panebianco*, *supra*, 543 F.2d at 453; *United States* v. *Stromberg*, 268 F.2d 256, 263-64 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959), and out of an excess of caution, Burman and Butler were named as defendants in a separate indictment, and were tried and convicted in separate proceedings before Judge Metzner, see p. 5, *supra*, at note.*

charge or omission therefrom. . . ." This Court has on innumerable occasions applied this general rule, *United States* v. *Dozier*, 522 F.2d 224, 228 (2d Cir. 1975) (denial of rehearing); *United States* v. *Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975); *United States* v. *Nathan*, 536 F.2d 988, 992 (2d Cir.), *cert. denied*, — U.S. —, 45 U.S.L.W. 3331 (Nov. 1, 1976); *United States* v. *Magnano*, *supra*, 543 F.2d at 435-36; in particular, it has noted that a defendant who has failed to object at trial to an instruction on the issue of multiple conspiracies is "ill-equipped" to object to it on appeal, *United States* v. *Head*, *supra*, 546 F.2d at 7,* and has held that even if a requested charge was submitted to the trial judge, the request must be "accurate in every respect" if the instruction actually given is to be attacked on appeal, *United States* v. *Lam Lek Chong*, 544 F.2d 58, 68 (2d Cir. 1976). The appellants clearly fail to meet these tests.

At any rate, the instruction given to the jury was entirely proper. During the course of a lengthy discussion of the legal requirements of the conspiracy count, the Court emphasized that the jurors must find beyond a reasonable doubt that the conspiracy alleged in the indictment in face existed (Tr. 1848)** and defined to them how they could determine if the conspiratorial agreement existed. (Tr. 1849-51). The jurors were then told they must determine as to each defendant that "the particular defendant . . . knowingly associated

* White, Franklin and Jackson are particularly "ill-equipped" in this regard. As noted earlier in this brief, p. 19, *supra*, at n.*, not one of them even mentioned the issue during summation. It is thus inconceivable that a jury could have reached a different verdict on the basis of a different instruction.

** Indeed, the Court noted that the jurors must find that between the dates alleged in the indictment "there was *an* agreement between two or more of the persons named in the indictment . . . ." (Tr. 1848) (emphasis added).

himself or herself with *the* conspiracy." (Tr. 1852) (emphasis added). The Court described at some length the evidence required to make this finding (Tr. 1853-55) as well as the other requirements of the conspiracy charge. (Tr. 1855-57). This charge fully complied with the requirements established by this Court for instructions on the multiple conspiracy question. *United States* v. *Taylor*, *supra*, slip op. at 2809-10; *United States* v. *Lam Lek Chong*, *supra*, 544 F.2d at 68; *United States* v. *Armedo-Sarmiento*, *supra*, 545 F.2d at 790; *United States* v. *Tramunti*, *supra*, 513 F.2d at 1107-08.

POINT III

The Use of the Grand Jury Testimony of the Witness Samson Williams Was Entirely Proper.

Marx Jackson * claims on appeal that the use at trial of the prior grand jury testimony of a witness deprived

* White, Brief at 29, and Franklin, Brief at 28, each claim to join Jackson's argument on this point. As the facts reveal, of course, the particular witness never even mentioned either White or Franklin. Thus, as the District Court specifically noted (Tr. 1024), they have no standing to complain of claimed violations of *Jackson's* Sixth Amendment right. In addition, Judge Conner instructed the jury that the testimony concerned only Jackson (Tr. 1028), even though Jackson's and Earl Rivers' statements to Williams were clearly statements of co-conspirators admissible against White and Franklin under F. R. Evid. 801 (d)(2)(E).

This fact alone requires affirmance of White's and Franklin's convictions. In reality, their sole claims on appeal concern the conspiracy counts of which they were convicted. Since each of them was also convicted of at least one substantive offense and received concurrent sentences, it follows that under the concurrent sentence doctrine this Court need not, and should not, pass on their claims. *United States* v. *Mejias*, Dkt. No. 76-1395, slip op. 2269, 2288 (2d Cir. March 10, 1977); *United States* v. *Hanlon*,

[Footnote continued on following page]

him of his right to confrontation. This argument is premised upon a distortion of the facts and a misunderstanding of the governing legal principles, and is totally without merit.

A. The facts

In February 1976, during the grand jury investigation leading to this indictment, Samson Williams was brought to the Southern District of New York pursuant to a writ of *habeas corpus ad testificandum*. Shortly after arriving, he spoke with Assistant United States Attorney Davis and Drug Enforcement Administration Special Agent James Peacher in the office of the United States Attorney. During that interview, Williams was asked about his knowledge of Earl Rivers and "Moxie." * Williams described his knowledge of those individuals, and in particular described conversations he had had with Rivers and with "Moxie" concerning heroin. During this conversation, Williams was simply asked questions and gave answers; he was not in any way instructed what to say, nor were answers suggested to him. (Tr. 1057). At the end of the interview, Williams was shown an array of photographs of approximately twenty different black males. From this array he selected the photograph of Marx Jackson as "Moxie" and the photograph of Raymond Anderson as a person he had seen with Marx Jackson in Washington, D.C. (Tr. 1059; GX 1, 15, 16). Shortly thereafter, Williams appeared before the Grand Jury and, after declining to answer a question on the grounds of possible self-incrimination, was conferred use immunity pursuant to 18 U.S.C. §§ 6002-03. After receiving extensive further warnings concerning his constitutional rights and the importance of accurate testimony in the grand jury (GX 14),* Williams answered the prosecutor's questions concerning his earlier statements about "Moxie" and Earl Rivers. In particular, he noted that Rivers had approached him with a proposal to distribute heroin from a new source, but that "Moxie" later told Rivers that he wanted the source for himself. (GX 14).

548 F.2d 1096, 1099 (2d Cir. 1977). While under *Benton* v. *Maryland*, 395 U.S. 784 (1969), this Court has power to hear the claims concerning the conspiracy count, in this case neither White nor Franklin has even alleged that any collateral consequences resulted from their conviction on that count. *Cf. Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *United States* v. *Vasquez*, 468 F.2d 565, 566-67 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); *United States* v. *Gaines*, 460 F.2d 176, 179-80 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972).

* "Moxie" was the name by which Marx Jackson was known to Earl Rivers (Tr. 387-88) and Edith Rivers. (Tr. 74-75).

When the time for Williams' appearance as a witness at trial arrived, the prosecutor noted that Williams had refused in the grand jury to testify without immunity, and suggested that his present willingness to testify be explored out of the presence of the jury. See *United States* v. *Sanchez*, 459 F.2d 100, 103 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972). Williams was then sworn as a witness and indicated that he would indeed refuse to answer questions on the ground of possible self-incrimination, at which point Judge Conner conferred further use immunity upon him. (Tr. 945-46). Various defense counsel then objected that Williams' appearance might not be proper if he refused to testify (Tr. 948-58), and Williams was again asked several questions in the absence of the jury. During this interchange, it became clear that Williams' testimony would be diametrically

* While only portions of the Grand Jury testimony were eventually admitted into evidence, the entire transcript was marked for identification as GX 14. That relatively lengthy transcript reveals the care with which the importance of the proceeding was impressed on the witness.

opposite to that which he had previously related to the grand jury. (Tr. 960, 963). After further oral argument (Tr. 963-84), the trial court ruled that the Government could question Williams and, if necessary, impeach him with his prior grand jury testimony.

Williams then testified before the jury. He acknowledged that he knew a person named "Moxie," whom he identified in Court as the defendant Jackson (Tr. 986), and also acknowledged knowing a person named Earl in Washington, D.C. When asked whether "Earl" had ever offered to introduce him to a source of heroin, he denied that this had occurred, stating "Not that I recall." (Tr. 986). Williams' contradictory statements before the grand jury were then read into evidence. (Tr. 987). In similar fashion, after in each case Williams denied the occurrence, his testimony before the Grand Jury that "Moxie" had stated that he wished to keep "Earl's" source to himself and Williams' selection of the photograph of Raymond Anderson as a person he had seen with "Moxie" were introduced into evidence. (Tr. 988-94).

Williams was then cross-examined at considerable length by counsel for Jackson. In response to questions asked by Jackson's counsel, Williams specifically denied the truth of the various statements he had made in the grand jury. In particular, he noted that he had never had any conversations with Rivers and indeed barely knew him (Tr. 995) and that he had "never" spoken with Earl about Moxie. (Tr. 1001). Indeed, he specifically noted that "Me and Moxie have never to my knowledge had any conversation about Earl or with Earl." (Tr. 1007). In addition, Williams offered several explanations for the variance between his trial and his grand jury testimony. At various times he asserted that his "mental state" caused him to answer as he had before the grand jury (Tr. 1010), that he had had trouble hearing in the grand jury room (Tr. 996), that he did not understand the questions in the grand jury (Tr. 997), and that he

was "drug [dragged] before the grand jury against my will, and to get out of there I guess I just said 'Yes' to everything they asked, I imagine." (Tr. 1002). He also stated that he knew several persons named "Moxie," all of whom lived in Washington, D.C. (Tr. 1013).

On re-direct examination, the prosecutor further explored the circumstances of Williams' appearance in the grand jury. In response to one question, Williams suddenly asserted that he had testified in the grand jury only to things the prosecutor "was telling me to say." (Tr. 1026-27). Finally, Williams denied that he had selected Jackson's photograph as being that of "Moxie." (Tr. 1039).

Williams' testimony concluded the trial for that day. The following morning, the Government submitted a memorandum of law in support of the proposed testimony of Special Agent James Peacher. (Tr. 1046). In order to correct the false impression given by Williams that he testified in the grand jury to what the prosecutor "told him what to say," the Government was allowed, under the principles of *United States* v. *Rivera*, 513 F. 2d 519, 527-28 (2d Cir. 1975), to elicit from Agent Peacher a brief description of the meeting among Williams, himself and the prosecutor prior to Williams' appearance in the grand jury. Peacher emphasized that Williams was only asked questions, and that the information contained in his answers were neither suggested nor supplied. (Tr. 1056-57). In addition, and to rebut Williams' trial testimony that he had not selected a photograph of Jackson as "Moxie," Peacher described Williams' selection of Jackson's photograph from an array of photographs of black males. (Tr. 1058-59).*

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* This testimony was offered under F. R. Evid. 801(d)(1)(C), excepting from the hearsay rule a prior statement "of identification of a person made after perceiving him . . . ."

B. The prior inconsistent statement was properly admitted under the Federal Rules of Evidence, and did not violate Jackson's right of confrontation.

As Jackson admits, Brief at 32, 38, it has long been settled that prior inconsistent statements made under oath are admissible as substantive evidence if the declarant is subject to cross-examination at the trial, *United States* v. *Blitz*, 533 F.2d 1329, 1345 (2d Cir.), *cert. denied*, 97 S. Ct. 65 (Oct. 4, 1976); *United States* v. *Jordano*, 521 F.2d 695, 697 (2d Cir. 1975); *United States* v. *Rivera*, *supra*, 513 F.2d at 526-29; *United States* v. *Desisto*, 329 F.2d 929, 932-34 (2d Cir. 1964), *cert. denied*, 377 U.S. 979 (1964), and that this procedure is consistent with a defendant's right of confrontation. *California* v. *Green*, 399 U.S. 149 (1970). This long-standing rule is now codified in F. R. Evid. 801 (d)(1)(A).* Furthermore, Jackson concedes (subject to a minor reservation discussed *infra*, pp. 41-43) that "the declarant"—Williams—testified at trial; that his prior statement was inconsistent with his testimony at trial; and that the prior statement was given under oath at the grand jury. Brief at 39. Jackson's sole contention is that Williams was not subject to cross-examination concerning the statement. *Id.* Thus, his assertion under the Federal Rules of Evidence is identical to his argument that the proceedings denied him his Sixth Amendment right of confrontation, and the claims can be considered together.

The essential assertion made in Jackson's brief is that Williams could not remember either the events about

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* Rule 801(d)(1)(A) provides as follows:

A statement is not hearsay if . . .

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. . . .

which his testimony was introduced or the making of his prior statement in the grand jury. Thus, Jackson claims:

> On direct examination of Williams, the prosecutor's questions tracked those asked of him before the grand jury. To each question the witness responded to the effect that *he could not recall the event*. The prosecutor then asked him about his answer to the identical question in the Grand jury, to which the witness also answered that *he could not recall giving the testimony*.
>
> On cross examination by Jackson's attorney, Samson Williams gave an encore. *He could not recall the event* about which the prosecutor questioned him; *nor, could he recall* being asked the question in the grand jury or giving the answers that appeared in the transcript.

Brief at 37-38 (emphasis added). See also Br. at 42 ("he said that he did not remember the events.") These factual assertions are simply incorrect. To the contrary, at trial Williams was extensively questioned about the underlying facts, and offered a version of the events that, if believed, was wholly exculpatory of Jackson. For example, while Jackson paraphrases Williams' responses that "he could not recall the event," *id.*, a review of the record demonstrates that Williams' response, when asked whether an event about which he testified in the grand jury occurred, was "Not that I recall." (See, *e.g.*, Tr. 986, 988, 990, 992, 997, 999, 1001, 1004, 1007, 1012, 1013, containing 15 such responses). Significantly, Williams *not once* answered a question about the underlying facts by stating "I do not recall." The difference, of course, is not purely semantic. While the paraphrase offered by Jackson would indicate that Williams did not remember the event, the actual response showed that to his best present recollection the event did not in fact take place. Furthermore, Williams offered several explicit and affirmative denials of the events about which he had testified. For example,

while Williams admitted both on direct and cross-examination that he knew Earl and Joe King (Tr. 986, 989), he stated that he "never" talked to Earl about Moxie. (Tr. 1001). Furthermore, he responded in the negative when asked "Did the person named Earl tell you that he was going to introduce you to a source? (Tr. 1004), stated that "I have never seen" Anderson (Tr. 1005-06), that he had "never" had a conversation with Jackson about Raymond Anderson (Tr. 1007), that he had "never" had a conversation with Earl about narcotics (*id.*), and that "Me and Moxie have never to my knowledge had any conversation about Earl or with Earl." (*Id.*, see also Tr. 1010-11). In addition, after providing extensive description of Harrington's (the bar where the meeting between Rivers, Anderson and Jackson took place, see Tr. 387). Williams noted "I don't ever recall seeing Moxie and Earl at the same time, not that I recall." (Tr. 1012). In short, Williams on both direct and cross-examination categorically denied the truthfulness of his prior statements.* He did not claim to have any real lack of knowledge about the events.**

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* Indeed, while Jackson's attorney now claims that Williams could not remember the events, his comments at the time were to the contrary. For example, in questioning Williams, he asked "Now, you have pretty much, sir, denied the truthfulness of these statements that appear in the transcript as having been your testimony before the grand jury?" to which Williams responded, "Yes, Sir." (Tr. 1008; see also Tr. 1005). Indeed, the prosecutor was careful that this point be explicit. On redirect examination the prosecutor asked "Mr. Williams, you testified on cross-examination that you denied the truthfulness, if a remember the phrase, of the statements that were read to you from your grand jury testimony; is that right?" (Tr. 1014-15). After the question was rephrased for the witness several times, he was asked, "So it would be fair to say then you deny the truthfulness," to which Williams responded "That is right." (Tr. 1016). On cross, Williams had noted that his prior testimony was not "truthful." (Tr. 998).

** As Jackson points out, when Williams was first called out of the presence of the jury he stated "I don't know anything

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Furthermore, and again contrary to Jackson's assertion, Williams both remembered and was extensively cross-examined about his appearance in the grand jury and the circumstances of his giving his previous, inconsistent testimony.* As the record reveals, he provided extensive

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about this matter." (Tr. 952; see also Tr. 959). This claim is without significance for two reasons. First, it was demonstrably false. Not only had Williams already testified about the matter, but at trial he subsequently demonstrated that he knew the principals involved and was in a position to testify about whether, in his present view, Jackson, Rivers, and Anderson had had the meeting about which there had been testimony. Second, there was every reason on the record to disbelieve Williams' statement as self-serving and inaccurate. Both Williams (Tr. 984-85) and Jackson (Tr. 1496) admitted that they were friends of long-standing, and indeed Williams stated that he had been in contact with Jackson between the time of his grand jury appearance and the trial. (Tr. 983-84, 1016).

As Wigmore has pointed out,

> the unwilling witness often takes refuge in a failure to remember, and the astute liar is sometimes impregnable unless his flank can be exposed to an attack of this sort.

3A Wigmore, *Evidence*, § 1043 at 1061 (Chadbourne rev. 1970). Indeed, in *United States* v. *Insana*, 423 F.2d 1165 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970), this Court noted that while a witness should not testify if he "*in good faith* asserts that he cannot remember the relevant events," "this does not mean that the trial judge's hands should be tied where a witness does not deny making the statements nor the truth thereof but merely falsifies a lack of memory." Id. at 1170 (emphasis added). While *Insana* was a more extreme case than this since the witness acknowledged that his statements in the grand jury were true, as commentators have noted, its principles extend to cases where the witness falsely denies knowledge of the events and continues to deny the truthfulness of the prior statement. See 4 Weinstein, *Evidence*, 801-84-86. (1976).

* While our principal point is that Jackson's argument is without factual foundation, even if Williams was totally without recollection of the circumstances of giving his previous statement, neither the Federal Rules of Evidence nor the confrontation clause would be violated. This was made explicit in *Nelson* v. *O'Neil*, 402 U.S. 622 (1971). In that case, a co-defendant who

[Footnote continued on following page]

descriptions of the manner in which he testified in the grand jury,* the manner in which the questions

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had previously made a confession implicating O'Neil testified at a joint trial. He offered a version of the events that was totally exculpatory of O'Neil, and denied having made the confession. Agents then testified about the contents of the statement. The Court held "that where a co-defendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments." *Id.* at 629-30. This case, of course, follows *a fortiori* from *Nelson* since Williams' prior statement was under oath and, as will be noted, he offered extensive commentary on the making of it. See 4 Weinstein, *Evidence*, *supra*, at 801-88; McCormick, *Evidence*, § 39 at 82 (1964).

* One such detail is interesting. On re-direct examination, a portion of Williams' grand jury testimony was read to him in which the prosecutor, in the grand jury room, carefully explained to Williams that "the gentleman to your left is a court reporter who is stenographically reporting my questions and your answers," and that since Williams was under oath he must give accurate and truthful answers. (Tr. 1035; GX 14). Several moments later, when Williams was explaining that his hearing had been faulty in the grand jury room, the following interchange took place:

A. Well, for one thing, I could not hear very well at that particular time.

Q. Have you trouble hearing me today?

A. No, I have not.

Q. Have you had a history of hearing problems?

A. Yes.

Q. You were treated?

A. You are saying the man was on my left and the grand jury—

Q. I didn't say anything. The grand jury minutes—

A. When you read that, you said that the reporter was on my left.

Q. Right.

[Footnote continued on following page]

were asked and his understanding of their import. Furthermore, as indicated *supra*, pp. 32-33, he offered numerous explanations for the inconsistency between his earlier statement and his present testimony, including faulty hearing (Tr. 996), confusion (Tr. 997), indifference (Tr. 1002), and coercion. (Tr. 1026-27). Any one of these explanations, if believed, would have totally discredited the probative value of the prior statements, and indeed would have discredited the prosecution as a whole.

In short, both as to the underlying events and the making of the statements themselves, the jury had before them a witness who was not only subject to cross-examination, but actually provided totally exculpatory evidence. It could decide, based upon the demeanor of the witness, the manner of his testimony, and the circumstances of his testifying both in the grand jury and the courtroom whether it chose to believe what he said at trial or to give the prior statements whatever probative evidence they contained. *Di Carlo* v. *United States*, 6 F.2d 364 (2d Cir. 1925). Furthermore, the decisions upon which Jackson relies are not only totally distinguishable but underscore the fulness of the opportunity to

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A. Well, that is my bad hearing ear.

Q. It is your testimony that the reporter was saying something to you?

A. No. I am saying what you said, that the reporter was on my left in the grand jury room. You said that, you just read that.

Q. And you could not hear the reporter? Is that right?

A. Yes.

As the prosecutor noted in summation (Tr. 1628) this showed two things. First, Williams's recollection of the events in the grand jury room was remarkably precise. Second, his response was not only quick-witted but fraudulent, for the simple reason that the *reporter* is, of course, a silent listener and never speaks to the witness.

cross-examine that he was afforded. Without exception, those cases involve situations where the witness refused even to take the oath or be cross-examined, *United States* v. *Fiore*, 443 F.2d 112, 115 (2d Cir. 1971), *cert. denied*, 410 U.S. 984 (1973), pleaded the Fifth Amendment, *Douglas* v. *Alabama*, 380 U.S. 415 (1965), or was similarly unable or unwilling to provide any information concerning the events.* As indicated, this was simply not the case, and Jackson's argument is devoid of merit.

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* Jackson also relies upon the long and helpful discussion of F.R. Evid. 801(d)(1)(A) in Judge Weinstein's treatise. Weinstein, *supra*, at 801-63-98. In that treatise, Judge Weinstein poses six abstract hypotheticals concerning varous possible situations where the witness either reaffirms, denies, or claims lack of memory as to either the underlying events, the prior statements, or both. Jackson claims that his case is governed by the hypothetical where the witness states "I don't remember ever saying that before the grand jury and I don't remember anything about what happened." Brief at 41. As the following language from the treatise reveals, however, Judge Weinstein had in mind a situation radically different from the present one. Judge Weinstein notes that in the hypothetical the defendant cannot cross-examine the witness "unless [the witness] says something more, gives some details about the event in question. . . ." Weinstein, *supra*, at 801-97. This, of course, is precisely what Williams did, not only denying the truthfulness of the prior statements, but claiming that he never even saw "Moxie" and Earl together and that he never saw either with Raymond Anderson.

Similarly, Judge Weinstein notes "When a witness denies making the statement he may at times offer reasons to substantiate his claim—as for instance, that he was out of town the day the statement was allegedly made. When the witness denies recollection, all such opportunities for refuting the making of the statement disappear." *Id.* Here, of course, Williams did "offer reasons" for the inconsistency of his statements, and thus provided Jackson with ample means of "refuting the making of the statement." In short, under Judge Weinstein's analysis, the prior testimony of Williams was properly admitted.

C. The use of Williams' prior grand jury testimony did not deprive Jackson of Due Process.

In his final assault on the use of the Williams grand jury testimony,* Jackson asserts that "Due process considerations" should have precluded the use of the statements at trial. Brief at 60-61. This claim is not only unprecedented—indeed, it is symptomatic that the entire point is totally devoid of judicial authority—but incorrect.

Jackson's assertion appears to be that since the grand jury testimony was less than entirely specific and consisted of answers to leading questions, it should not have been admitted. This Court, of course, has long observed that the usual rules of evidence do not apply in grand jury proceedings, *In re Millow*, 529 F.2d 770, 774 (2d Cir. 1976), and thus the form of the questions is irrelevant. Furthermore, while the minutes themselves did not discuss the dates at which various transactions occurred, Williams was available for cross-examination on just such details, and did provide information on the dates when

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* In an argument that Government counsel frankly has some difficulty understanding, Jackson also argues that since Rivers was the declarant, Williams' testimony was somehow inadmissible. Brief at 57-59. Williams' grand jury testmiony clearly related to the relationship among Rivers, Jackson, and Anderson—facts that were central to the trial. Furthermore, since Rivers had already described the meeting in his direct testimony (and had particularly described "As I went to walk away I turned and started to say somethnig to Sampson. Moxie stopped me and told me, he said, "Boy, look, don't say nothing to anybody, boy, I can get all this" (Tr. 390), and since his motive to fabricate was alleged, the testimony was admissible as a prior consistent statement. F.R.Evid. (d)(1)(B); *United States* v. *Lombardi*, Dkt. No. 76-1471, slip op. 2103, 2105 (2d Cir., March 1, 1977). Jackson's claim that "On the part of Rivers, the statements are wholly self-serving, not merely from the ordinary viewpoint; but due to his role in this case as the chief government witness his motivation to fabricate incriminating evidence against Jackson was high," Brief at 59, is astonishing, since at the time of the events Williams described, Rivers was a fellow conspirator not even under arrest.

he saw Earl in Washington. (Tr. 987-88).* Most fundamentally, however, and as the District Court explicitly noted, that objection relates to the weight to be given to the evidence, not to its admissibility. (Tr. 967).** Indeed, Jackson's lawyer effectively argued in summation that the statements should not be given any weight because of the form of the questions (Tr. 1683-89), and attempted on cross-examination to explain away the statements.*** Since his claim is in reality a thinly disguised attack on the probative value of the statements, Judge Conner's decision to admit it—reached only after extended discussion and receipt of a memorandum on the issue—should not be overturned absent a clear abuse of discretion, see *United States* v. *Cheung Kin Ping*, Dkt. No. 76-1362,

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* In addition, there was simply no dispute that the meeting in fact occurred. Jackson, when he testified, described being introduced to Raymond Anderson by Earl Rivers at Harrington's when Samson Williams was nearby. (Tr. 1475-82). Jackson merely denied that the conversation concerned narcotics. As to this, Williams' testimony was precise.

** In addition, Judge Conner noted, "On request I will instruct the jury that they may consider in determining the credibility of the testimony the fact that it was given in response to leading questions, which, incidentally, is permissible in the grand jury, but would not be permissible here. . . [O]n request I would instruct the jury that they may take into account in determining the weight to be given that evidence that it was given in response to leading questions, if that is a fact." (Tr. 966-67). Significantly, defense counsel did not request such an instruction.

*** For example, he elicited the fact that Williams did not know the last name of "Earl," and knew several persons with that first name, thus allowing the jury to conclude that Williams was not speaking about Earl Rivers. (Tr. 999). His similar attempt to elecit that Williams also knew several persons named "Moxie," all of whom, by coincidence, lived in Washington, backfired. As indicated, the Government subsequently demonstrated that Williams selected a photograph of Marx Jackson from a large array of photographs as the "Moxie" about whom he testified. (Tr. 1059).

slip op. 2063, 2071 (2d Cir., Feb. 28, 1977), and cases there cited, giving full consideration to the unique position of the trial judge, who has an understanding for the effect of such evidence "that an appellate court, working from a written record, simply cannot obtain." *United States* v. *Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert denied*, 425 U.S. 958 (1976).* Finally, Jackson deliberately attempted to prevent the jury from having a complete understanding of the actual facts underlying Williams' testimony. For example, while the grand jury minutes contained lengthy introductory material in which the prosecutor carefully explained the importance of the proceeding and the need for accurate and truthful testimony, Jackson vociferously objected to the jury seeing any portion of the minutes. (Tr. 1019-25). Similarly, while the prosecutor made an offer of proof as to precisely how Williams was interviewed and brought to the grand jury both orally (Tr. 948-58) and in a written memorandum (Tr. 1046), and actually called Agent Peacher to testify to a portion of those events (Tr. 1056), Jackson not only objected to calling Peacher (Tr. 1046-54) but did not cross-examine him. (Tr. 1075).** Thus, Jackson was in a position to have the jury fully informed about the precise course of events that led to Williams' grand jury appearance, and deliberately chose not to do so. Whatever the merits of that tactical choice, it totally belies his present claim that that chain of events deprived him of due process.***

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* Judge Conner explicitly noted that preventing the witness from being called and confronted with his grand jury testimony, would be utterly unfair to the Government. (Tr. 981).

** Jackson later called Peacher as his own witness about those events. (Tr. 1546-49).

*** Finally, it should be noted that Jackson was under unusual notice about the use of Williams as a witness. Not only were Williams' prior statements turned over to Jackson a day or two in advance of his testimony (Tr. 951), but the issue of his

[Footnote continued on following page]

POINT IV

Venue On Count Six Was Proper.

Marx Jackson contends that his conviction under Count Six * for the substantive crime of possessing and distributing heroin must be reversed because of improper venue. His contention is without merit.

Count Six concerned one of three packages of heroin that Rivers delivered from Anderson to Jackson. As will be recalled from the Statement of Facts, at the initial meeting among Rivers, Anderson and Jackson in Washington, D.C., Rivers reluctantly agreed to acts as a courier for packages of heroin that Jackson wished to purchase from Anderson. See p. 12, *supra*. Pursuant to this

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testifying was discussed prior to trial. On the date on which trial was scheduled to commence, counsel for Jackson informed the Court that he had previously represented Samson Williams. After extended discussion, Judge Conner decided that there was a conflict of interest, and the trial was adjourned to January 3, 1977. (Tr. 11/9/76, pp. 44-72). After the lunch break, however, Jackson himself called the Court and the parties together and announced, through his counsel, that he had considered the matter and that he wished to continue with his present counsel. Judge Conner then personally addressed Jackson and determined that Jackson wished to waive whatever possible conflict might arise if Williams testified. (Tr. 11/9/76, pp. 72-78). The trial commenced the following day. Judge Conner's determination—which is not attacked on appeal—was clearly required by this Court's decision in *United States* v. *Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975). For present purposes, it demonstrates the advance notice that Jackson and his attorney had that Williams would testify in the trial.

* Jackson wisely does not challenge venue on Count One, the conspiracy count. *Hyde* v. *United States*, 225 U.S. 347, 359 (1912).

agreement, he carried one package of heroin on the very day after the agreement and another package at the time of the first trip to Williamsport by Johnson and White. *Supra*, p. 12. The final package was delivered by both Earl and Edith Rivers in the very early hours of the morning. At the time of the delivery, Jackson stated that he would not pay Rivers for the heroin because he had agreed with Anderson to travel to New York to do so on the following weekend. (P. 12-13, *supra*; Tr. 74).

Initially, it should be noted that the Government bears the burden of proving venue by a mere preponderance of the evidence. *United States* v. *Panebianco*, *supra*, 543 at 455; *United States* v. *Leong*, *supra*, 536 F.2d at 996; *United States* v. *Jenkins*, 510 F.2d 495, 498 (2d Cir. 1975).* Indeed, as benchmarks of the means by which the Government may meet this requirement, in each of the three cited cases there was absolutely no direct proof that the crimes in question occurred in the Southern District of New York at all. In each case, this Court held that since the defendants lived and worked in the Southern District, one could reasonably infer from that fact alone that at some point the criminal act, or part of it, was committed in the Southern District: In this case, by contrast, the direct evidence is explicit that the crime —that is, the distribution of the package of heroin—began at 2222 Eighth Avenue in the Southern District of New York. The sole question, then, is whether there has been a sufficient demonstration of Jackson's connection with the crime to suffice for a criminal prosecution in this District.

Jackson's possession of narcotics in the Southern District of New York is demonstrable under either of two

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* The *Jenkins* decision leaves open the "academic" question of whether the question of venue should be submitted to the jury at all. 510 F.2d at 498. In this case, Jackson never requested such an instruction.

theories. First, it is clear that he had constructive possession of the drug in New York City, since knowing that the source of the heroin was Raymond Anderson in New York City, he expressly directed Rivers to go to New York and bring the heroin to him, for which Rivers received payment. These actions fit clearly within the definition of "constructive possession." *United States* v. *Grant*, 545 F.2d 1309, 1313 (2d Cir. 1976). See also *United States* v. *Casalinuovo*, 350 F.2d 207, 209-211 (2d Cir. 1965).

Second, it is equally clear that Jackson was the principal in a criminal act aided and abetted by Rivers, during the course of which Rivers possessed the heroin in the Southern District of New York. The sufficiency of those acts for venue purposes follows clearly from the leading cases in this area.

In *United States* v. *Peoni*, 100 F.2d 401 (2d Cir. 1938) (L. Hand, J.), Peoni was charged with aiding and abetting the possession of counterfeit bills in the Eastern District of New York. The facts showed that Peoni sold counterfeit bills to one Regno, who in turn sold them to one Dorsey. Dorsey was arrested in the Eastern District of New York. The Court held that while Peoni might have surmised that Regno would sell the bills to someone else, he could not be held liable for *Dorsey's* illegal possession of them in the Eastern District. The *Peoni* decision was, quite logically, limited in the subsequent decision of *United States* v. *Campisi*, 306 F.2d 308 (2d Cir.), *cert. denied*, 371 U.S. 920 (1962), to the situation where the defendant did not directly deal with the person who actually entered the District.

Since the evidence is clear that Jackson dealt directly with both Anderson and Rivers, the *Campisi* decision, and not the *Peoni* decision, is controlling here. Indeed,

the facts here are virtually indistinguishable from cases in which venue in the Southern District have been upheld, such as *United States* v. *Bommarito*, 524 F.2d 140 (2d Cir. 1975);* *United States* v. *Bozza*, 365 F.2d 206, 221 (2d Cir. 1966); see also *Alexander* v. *United States*, 241 F.2d 351 (8th Cir.), *cert. denied*, 354 U.S. 940 (1957), in each of which a defendant was convicted of a substantive crime even though he had not set foot in the District. See also *United States* v. *Busic*, 549 F.2d 252 (2d Cir. 1977). Indeed, since the evidence is clear—although admittedly circumstantial—that Jackson *did* come to the Southern District of New York to complete the transaction charged in the indictment by paying Anderson for the drugs, this case follows *a fortiori* from the decisions cited.

Finally, Jackson's claim that his constitutional rights under Art. III, § 2, cl. 3 and the Sixth Amendment were violated because there is no evidence to show that he "was in the Southern District of New York at the time alleged," Brief at 62, is foreclosed by this Court's decision in *United States* v. *Chestnut*, 533 F.2d 40, 46 (2d Cir. 1976). As this Court there noted, "proper venue in a criminal case is determined by the locus of the offense," not the locus of the offender. *Id.* Applying this principle, this Court upheld Chestnut's conviction on a charge of improperly depositing a check in New York, even though Chestnut never even set foot in the District, noting that Chestnut's actions in Minnesota "caused" the commission of the offense in the Southern District. In this case, Jackson "caused" Rivers to travel to New York to pur-

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* The *Bommarito* opinion does not discuss the issue as one of venue, but rather as one of sufficiency of the evidence. A review of the briefs, howeover, indicates that the venue point, and in particular the applicability of *United States* v. *Peoni*, *supra*, was extensively discussed.

chase heroin from Anderson for him.* It follows from *Chestnut* that venue was proper.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

FREDERICK T. DAVIS,
Assistant United States Attorney,
Of Counsel.

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* 18 U.S.C. § 2(b), upon which the Court in *Chestnut* relied, provides that "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." While Count Six did not contain a reference to 18 U.S.C. § 2, this Court has held that such a reference is unnecessary. *United States* v. *Bommarito, supra,* 524 F.2d at 145; *United States* v. *Taylor,* 464 F.2d 240, 242 n.1 (2d Cir. 1972); *United States* v. *Tropiano,* 418 F.2d 1069, 1083 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970).

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Cert. filed in Bronx County
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